IN THE SUPREME COURT OF MISSISSIPPI
NO. 2010-CC-00076

MISSISSIPPI WINDSTORM UNDERWRITING ASSOCIATION — **APPELLANTS**

v.

UNION NATIONAL FIRE INSURANCE COMPANY, UNITED STATES FIRE INSURANCE COMPANY, A SUBSIDIARY OF CRUM & FORSTER HOLDING INC., RLI INSURANCE COMPANY, ONEBEACON INSURANCE GROUP, AEGIS SECURITY INSURANCE COMPANY, ZURICH AMERICAN INSURANCE COMPANY (FOR ITSELF AND ITS SUBSIDIARIES WHO ARE MEMBERS OF MWUA), HOMESITE INSURANCE COMPANY, FARMER INSURANCE GROUP OF COMPANIES AND ALLSTATE PROPERTY & CASUALTY INSURANCE COMPANY — **APPELLEES**

BRIEF OF APPELLEE UNITED STATES FIRE INSURANCE COMPANY

ON APPEAL FROM THE CHANCERY COURT OF HINDS COUNTY, MISSISSIPPI
NO. G-2007-2019 T/1

(ORAL ARGUMENT IS NOT REQUESTED)

Submitted by:
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CERTIFICATE OF INTERESTED PARTIES

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made in order that justices of the Supreme Court and/or the judges of the Court of Appeals may evaluate possible disqualification or recusal.

1. Mississippi Windstorm Underwriting Association, Appellant
2. Union National Fire Insurance Company, Appellee
3. Homesite Insurance Company, Appellee
4. Aegis Security Insurance Company, Appellee
5. OneBeacon Insurance Group, Appellee
6. United States Fire Insurance Company, a subsidiary of Crum & Forster Holding, Inc., Appellee
7. RLI Insurance Company, Appellee
8. Farmers Insurance Group of Companies, Appellee

9. Zurich American Insurance Company, Appellee

10. Allstate Property & Casualty Insurance Company, Appellee

11. Greg Copeland, Copeland Cook Taylor & Bush P.A., attorney for Appellant Mississippi Windstorm Underwriting Association

12. Rebecca Blunden, Copeland Cook Taylor & Bush P.A., attorney for Appellant Mississippi Windstorm Underwriting Association

13. Arthur Jernigan, Harris Jernigan & Geno, PLLC, attorney for Appellee Union National Fire Insurance Company

14. Samuel L. Anderson, Harris Jernigan & Geno, PLLC, attorney for Appellee Union National Fire Insurance Company

15. Marshall Ney, Mitchell Williams Selig Gates & Woodyard, PLLC, attorney for Appellee Homesite Insurance Company

16. Anton L. Janik, Jr., Mitchell Williams Selig Gates & Woodyard, PLLC, attorney for Appellee Homesite Insurance Company

17. James W. Shelson, Phelps Dunbar LLP, attorney for Appellee Homesite Insurance Company

18. David A. Morris, McGlinchey Stafford PLLC, attorney for Appellee Aegis Security Insurance Company

19. James F. Golden, Hamburg & Golden PC, attorney for Appellee Aegis Security Insurance Company

20. Craig D. Ginsburg, Hamburg & Golden PC, attorney for Appellee Aegis Security Insurance Company

21. Eric Hatten, Burr & Forman, attorney for Appellee RLI Insurance Company

22. Jennifer R. Warden, Taggart Morton, L.L.C., attorney for Appellee Farmers Insurance Group of Companies

23. Ross F. Bass, Jr., Phelps Dunbar LLP, attorney for Appellee Zurich American Insurance Company

24. Luther T. Munford, Phelps Dunbar LLP, attorney for Appellee Zurich American Insurance Company

25. Mike Wallace, Wise Carter Child & Caraway PA, attorney for Appellee Allstate Property & Casualty Insurance Group

26. Jeffery S. Dilley, Henke-Bufkin, attorney for Hartford Insurance Group

Respectfully submitted, this the 29th day of November, 2010.

Janet D. McMurtray

JANET D. MCMURTRAY, ATTORNEY OF RECORD FOR APPELLEE UNITED STATES FIRE INSURANCE COMPANY

STATEMENT REGARDING ORAL ARGUMENT

Appellee does not request oral argument in this appeal. The trial court's ruling was correct. The Chancery Court therefore did not commit any errors of law that would warrant reversal. Nor does this appeal raise any complicated issues of fact or unsettled issues of law; to the contrary – all issues raised by Appellant are in fact well-settled under existing Mississippi law. Accordingly, Appellee submits that oral argument is not necessary to the determination of the issues presented by this appeal.

STATEMENT OF ISSUES

1. Does the Mississippi Windstorm Underwriting Association ("MWUA") have the legal right to refuse to give insurers who wrote insurance in the six statutorily designated high risk coastal counties the statutorily required credit for those voluntary premiums without amending the MWUA's Plan of Operation or otherwise promulgating a rule and based solely on a letter purporting to impose a deadline where none existed before?

2. What is the proper treatment of voluntary premiums in the calculation of MWUA assessments?

3. Whether MWUA can deny the statutorily-mandated credit for voluntary premiums.

4. Can MWUA enforce a deadline and procedure outlined only in an undated, unpublished letter and never promulgated as part of MWUA rules or Plan of Operation to deny United States Fire the credit for voluntary premiums mandated by the Mississippi statutes?

INTRODUCTION

The issue in this appeal is a very simple one: Does the Mississippi Windstorm Underwriting Association ("MWUA") have the legal right to refuse to give insurers who wrote insurance in the six statutorily designated high risk coastal counties the statutorily required credit

for those voluntary premiums without amending the MWUA's Plan of Operation and based solely on a letter purporting to impose a deadline where none existed before?

MWUA did not have the authority to refuse to apply the statutory voluntary credits. Moreover, MWUA did not have and could not get the authority to impose a deadline for reporting voluntary premiums without a legislative amendment or an amendment to its Plan of Operation or promulgation of a rule subject to approval by the Mississippi Commissioner of Insurance. MWUA did not accomplish or even try to accomplish any of these events before refusing to give United States Fire credit for its voluntary premiums. MWUA did not request a legislative amendment, amend its Plan of Operation or propose any new rules prior to its arbitrary decision to deny United States Fire credit for voluntary premiums. Moreover, and significantly, in the filings in this case, MWUA has failed to cite one single legal authority or basis to support its position that it can deprive insurer members of the statutorily-mandated right to such credits.

This case involves the allocation of Hurricane Katrina loss assessments among insurance companies who are required by statute to be members of MWUA. MWUA was created by the Mississippi Legislature to ensure the availability of property insurance on the Mississippi Gulf Coast. In so doing, the Mississippi Legislature provided procedural safeguards pursuant to which MWUA must operate. In addition, the legislature authorized credits for insurance voluntarily written in the coast area that reduce a member insurer's potential assessment in order to encourage insurers to write insurance on the coast. United States Fire and the other insurers who are Appellees and members of MWUA simply want the credits the Mississippi Legislature mandated they receive. MWUA has refused to apply those credits without citing a single statute or rule of MWUA giving it authority to do so.

This is not a complex insurance case as alleged by MWUA. The issues related to United States Fire are simply (1) the proper treatment of voluntary premiums in the calculation of MWUA assessments, and (2) whether MWUA can deny the statutorily-mandated credit for voluntary premiums.[1] The outcome of this case is determined by the enabling statutes that created MWUA and the MWUA Plan of Operation. MWUA has no authority under the statutes or the Plan of Operation to deny United States Fire the statutorily-mandated credit for voluntary premiums.

MWUA has stipulated that there is no deadline or procedure allowing it to refuse the credit for voluntary premiums. R. Vol. 37 at 1220, Stipulation Nos. 41, 44, R.E. 6. Instead, MWUA has denied United States Fire the benefit of its statutory protections based on an arbitrary deadline contained only in a letter and never promulgated as a rule or as part of the Plan of Operation. This unpublished letter has no legal effect whatsoever. Moreover, MWUA had an unpublished requirement that voluntary premiums had to be separately reported. This "requirement" is not in the statute or Plan of Operation. And, it has never been promulgated as a rule.

MWUA seeks to characterize United States Fire and the other Appellees as malcontents who are seeking to shift the burden of Hurricane Katrina assessments onto other member companies. To the contrary - - the Mississippi Legislature enacted the statutes requiring credit for premiums voluntarily written in the coast area. By refusing to allow these statutorily-mandated credits, MWUA has unfairly increased the assessments of the Appellees while giving a windfall to other member insurers to which they are not entitled. By legislative definition, it

---

[1] Additional issues have been raised by other Appellees and Cross-Appellants. Those issues include whether group reporting of premiums by affiliated companies should be allowed, the proper treatment of mobile home and the proper allocation of reinsurance proceeds. United States Fire did not raise those issues in the proceedings below and does not take any position concerning those issues here.

cannot be unfair or inequitable for United States Fire to receive the credit for voluntary premiums that the Mississippi Legislature mandated.

The Chancery Court correctly ruled that United States Fire is entitled to submit its voluntary premiums and that MWUA must recalculate the participation percentages for the Hurricane Katrina assessments after the Appellees have resubmitted premium information.

STATEMENT OF THE CASE

A. Course of Proceedings Below.

This case arises as a result of Hurricane Katrina. MWUA was responsible for paying wind damages for policies it had written covering wind and hail causes of loss in the high risk six coastal counties.[2] Claims under these policies exceeded MWUA's funds and level of reinsurance. As a result, MWUA assessed $540 million to its members in order to pay the claims.

Prior to Hurricane Katrina, neither the Mississippi statutes nor the MWUA Plan of Operation contained a deadline or a procedure for reporting voluntary premium to MWUA. This is not a matter which is in factual dispute. Rather, MWUA stipulated below that no such definition or deadline was contained in the statutes, Plan of Operation, or Manual of Rules and Procedures.[3] R. Vol. 37 at 1219, Stipulation Nos. 41, 44, 46, R.E. 6.

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[2] Those counties as determined by the Mississippi Legislature are Hancock, Harrison, Jackson, Pearl River, Stone and George Counties. Miss. Code Ann. § 83-34-1(f).

[3] In addition to the Plan of Operation, MWUA has a document entitled "Manual of Rules and Procedures." This Manual primarily deals with the relationship between MWUA and its policyholders and MWUA claims procedures. It is not clear from the record below if this Manual was ever approved by the Commissioner of Insurance. Moreover, MWUA has previously taken the position that the Manual is "an internal document that is neither a part of the insurance contract, a statute nor a document that is required by statute." *Luedke v. Audubon Ins. Co.*, 874 So. 2d 1029, 1032 (Miss. Ct. App. 2004). Whether MWUA could have published a rule with the procedures and deadline for reporting voluntary premiums in the Manual, however, is irrelevant. MWUA stipulated that it did not publish any such rule in the Manual. R. Vol. 37 at 1220, Stip. Nos. 40, 45, R.E. 6.

United States Fire submitted to MWUA a report of its voluntary premiums and requested a refund. On May 26, 2006, United States Fire appealed its assessment. R. Vol. 49 at 1, R.E. 11. MWUA denied United States Fire's appeal on July 27, 2006. R. Vol. 49 at 37, R.E. 12.

On August 18, 2006, United States Fire timely appealed to the Commissioner. R. Vol. 49 at 41, R.E. 13. On November 16, 2006, the Commissioner held an evidentiary hearing. On May 23, 2008, the Commissioner denied United States Fire's appeal holding that he owed MWUA deference in deciding assessment appeals. R. Vol. 51 at 364, R.E. 14.

On June 20, 2008, United States Fire appealed to the Hinds County Chancery Court. R. Vol. 19 at 2730, R.E. 15. All assessment appeals were consolidated before the Chancery Court. The Court sent summonses to all members of MWUA since any ruling might affect their assessment percentage. The summons stated:

> By this SUMMONS, you are required within forty-five (45) days of receipt of this Summons to notify the Court and the original parties whether or not your company wishes to participate in these appeals. Notification shall be made in the form attached to these summons (Entry of Appearance as an Interested Party). WHETHER OR NOT YOU RESPOND, **YOU WILL BE BOUND** BY THE RESULTS OF ANY ORDERS OF THE TRIAL AND/OR APPELLATE COURTS CONCERNING THE MWUA ASSESSMENTS FOR HURRICANE KATRINA. **YOU WILL BE REQUIRED TO PAY OR RECEIVE ANY REASSESSMENT OR REFUND ORDERED BY THE COURT WITHOUT ANY RIGHT OF FURTHER RECOURSE.**

R. Vol. 19 at 2634, 2643.

Although MWUA consistently raises alarms throughout its Appellant's Brief that allowing the Appellees to report voluntary premiums and farm property premiums would be unfair to other MWUA members and cause chaos, even after receiving the summons quoted

above, only one of those members filed any response of any kind in the Chancery Court proceeding, hardly the actions of a group of concerned insurers.[4]

The Chancery Court held a hearing on June 25, 2009 to address all issues involving the assessment appeals. R. Vol. 30 at Tr. p. 2, R.E. 17. Not one of the joined members asked to be heard. R. Vol. 30 at 3-5, R.E. 18-20. Subsequently, on December 15, 2009, the Chancery Court reversed the Commissioner, holding that MWUA had not promulgated rules establishing procedures and deadlines for reporting voluntary premiums and that its denial of United States Fire's appeal was arbitrary and capricious. R. Vol. 29 at 4159, R.E. 23. MWUA filed the present appeal on January 14, 2010.[5] CPV 19 at 2706. Similarly, MWUA has appealed the Chancery Court Order in the seven other assessment appeals. CPV 19 at 2706, R.E. 64. All appeals have been consolidated.

B. Factual Background.

1. MWUA is a Statutorily-Created Entity.

In creating MWUA, the Mississippi Legislature required all insurance companies authorized to write property insurance in Mississippi to be members of MWUA and subject to assessment in order to provide funds for MWUA to pay claims. Miss. Code Ann. § 83-34-3. Membership in MWUA is not optional and assessments are based on the amount of "net direct premiums" (a statutorily defined term) each insurer writes in Mississippi. The enabling statutes required MWUA to submit a proposed Plan of Operation for the administration of MWUA to the

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[4] Hartford filed a letter brief which simply stated that the "true-up process" with a March 1, 2006 deadline should be upheld and Zurich's position that no "true-up" should have been permitted at all should be denied. The letter does not appear in the record.

[5] MWUA takes the position that it is appealing on behalf of all of its members. It is incorrect. MWUA is appealing for the body as a whole through a Board decision. It is not appealing for each member, which would include the Appellees.

Commissioner for review and approval.[6] Miss. Code Ann. § 83-34-13. It further requires that net direct premiums be calculated according to the Plan of Operation. For each year, if property losses filed by policyholders and paid by MWUA exceed the total amounts collected in premiums together with the reinsurance purchased by MWUA, each member would be assessed an amount based on the net direct premiums a member company wrote in the state after giving effect to the credit for voluntary premiums. Miss. Code Ann. § 83-34-9.

2. MWUA Fails to Promulgate Rules Regarding Voluntary Premiums.

In creating MWUA, the Mississippi Legislature required MWUA to give insurers who voluntarily wrote property insurance in the six coastal counties credit against direct premiums. This credit for voluntary premiums reduced the percentage any such insurer would have of any assessment for hurricane-related damages. The reason for the credit is obvious - - each policy an insurer writes in the six coastal counties reduces the number of policies MWUA has to write. And, to the extent that a hurricane causes damages, each policy an insurer has reduces the overall exposure MWUA has for hurricane-related damages. Miss. Code Ann. § 83-34-9.[7] MWUA's Plan of Operation and Manual of Rules and Procedures similarly require MWUA to give credit for voluntary premiums.[8]

---

[6] MWUA has represented that the Plan of Operation was submitted to and approved by Mississippi Insurance Commissioner George Dale effective October 1, 1987.

[7] Mississippi Code Section 83-34-9 provides the following:

> **A member shall, in accordance with the plan of operation, annually receive credit for essential property insurance voluntarily written in a coast area,** and its participation in the writings of the association shall be reduced in accordance with the provisions of the plan of operation.) (emphasis added)

[8] Section IX of the MWUA Plan of Operation provides the following:

> Each member of the Association shall participate in the writings, expenses, profits and losses in the proportion that the net direct premiums of such member written in the State during the preceding calendar year bear to the aggregate net direct premiums written in the State by all members of the Association. The Commissioner shall certify to the Association, after review of the annual statements, other reports, and any other statistics

Significantly, neither the statute, Plan of Operation or Manual of Rules and Procedures contains a deadline or procedure for reporting voluntary premium.

Based on the statutory mandate, repeated in the Plan of Operation as well as in the Manual of Rules and Procedures, voluntary premiums must be credited to reduce a member's participation in the writings of MWUA and thereby reduce its assessment. Accordingly, writing insurance on property in the six coastal counties reduces the percentage of participation in any assessment as a result of the legislature's desire to create an incentive to write property insurance in the coastal area.

> he shall deem necessary, the aggregate net direct premiums written by all members. However, **a member shall annually receive credit for Essential Property Insurance voluntarily written and its participation in the writings of the Association shall be reduced accordingly,** except all members shall participate in the first ten percent (10%) of losses. (emphasis added) R. Vol. 37 at 1082, R.E. 69.

Section VII of the MWUA Manual of Rules and Procedures provides the following:

> **CREDIT FOR BUSINESS WRITTEN ON A VOLUNTARY BASIS**
>
> **Member companies shall receive annually credit for Essential Property Insurance voluntarily written and their participation in the "pool" shall be reduced accordingly.** Member companies' participation in the expenses of the Association shall not be reduced thereby. The method of determination of such credit shall be as authorized by the Plan of Operation as implemented by the Board of Directors.

Section VIII of the MWUA Manual of Rules and Procedures provides the following:

> **2. Participating Companies**
>
> A. A company shall participate in writings, expenses, profits and losses in proportion that its net direct premium written in this state during the preceding calendar year bears to the aggregate net direct premiums written in this State. Such calculations shall be carried to five decimals.
>
> B. A participating company **shall annually receive credit toward participation in the Association for Essential Property Insurance voluntarily written** in the "Pool." Each participating company in order to receive such credit, shall set up the necessary statistical procedure whereby they can accurately determine and furnish to the Association their voluntary writings. **Such information shall be verified to the satisfaction of the Association and shall be submitted in a form mutually agreed on by the Company and the Association.** (emphasis added)

In 2005, neither the MWUA governing statutes, the MWUA Plan of Operation, or the MWUA Manual of Rules and Procedures[9] provided a timeline, deadline or procedure for the submission of voluntary premiums for the credit against net direct premiums mandated by Miss. Code Ann. §83-34-9.[10] R. Vol. 37 at 1220, Stipulation Nos. 41, 44, 46, R.E. 6.

The parties agree that the only deadline or procedures for reporting voluntary premiums to MWUA were contained in an undated letter, which was not available publicly in any manner whatsoever and which was never promulgated, published, or adopted by MWUA and never approved by the Commissioner. MWUA claims it sent the letter once to each company, when it first became a member of MWUA. In any event, simply mailing an undated letter is not a promulgation of a rule. MWUA admits that it never sent the letter to any insurer again, either with the annual Insurer's Report form or otherwise.

3. The Insurer's Report Form is Incomplete and Misleading.

Each year MWUA would send to its members an Insurer's Report and request that the report be completed and returned to MWUA. Based on this Insurer's Report, MWUA would calculate each member's preliminary allocation percentages of participation. A copy of the report is reproduced below:

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[9] Again, United States Fire discusses the Manual since it is a written document available to United States Fire. It is not, however, a document with rules promulgated by MWUA as required by statute. MWUA has judicially taken the position that the Manual is not a governing document and is merely "an internal document that is neither a part of the insurance contract, a statute, nor a document that is required by statute. *See Luedke v. Audubon Ins. Co.*, 874 So. 2d 1029, 1032 (Miss. Ct. App. 2004). Moreover, there is no record indication that the Manual has been approved by the Commissioner.

[10] The Plan of Operation <u>now</u> provides both a deadline and a method for reporting voluntary premiums.

INSURER'S REPORT TO
MISSISSIPPI WINDSTORM UNDE. .RITING ASSOCIATION
P.O. Box 5369, Jackson, Mississippi 39296-5369

Name of Member Company or Company Grou: **Crum & Forster Insurance**

PART I: Annual Statement - Direct Premiums Written - Page 15, Column 1 - Mississippi - 2004

Fire (Line 1)	Allied Lines (Line 2.1)	Farmowners (Line 3)	Homeowners (Line 4)	Commercial Multi-Peril (Line 5.1)	Total (Line 1 - 8)
447,915	422,471	0	0	0	870,386

PART II: Refinement of Premiums written for 2004 as shown on lines 2.1, 3, 4 and 5.1 of Page 15 of Company's Annual Statement to the Insurance Commissioner of the State of Mississippi.

	Direct Premiums Written Statewide*
A. Extended Coverage (including Basic Group II Causes of Loss of the New Simplified Commercial Lines Program):	
1. Dwelling Property Including Farm Dwelling Property**	$ 0
2. Farm Property Other Than Farm Dwelling Property	$ 0
3. All Other Than Dwelling or Farm Property (Commercial Mono-Line including Habitational, Mercantile, Non-Manufacturing, Warehouses and Yards, Manufacturing and Processing)	$ 422,471
B. Homeowners/Farmowners Multi-Peril:	
1. Homeowners (Total Policy Premiums)	$ 0
2. Farmowners (Total Policy Premiums)	$ 0
C. Commercial Multi-Peril: Extended Coverage only (including Basic Group II, Causes of Loss of the New Simplified Commercial Lines Program)	$ 0
D. Indivisible Premium Commercial Multi-Peril (Total Policy Premium)	$ 0

PART III: Any Extended Coverage (including Basic Group II Extended Coverage Causes of Loss of the New Simplified Commercial Lines Program) Premium indicated on Page 14 of Company's Annual Statement to the Insurance Commissioner of the State of Mississippi on lines other than 2.1, 3, 4 or 5.1.

1. Dwelling Property Including Farm Dwelling Property**	$ 0
2. Farm Property Other Than Farm Dwelling Property	$ 0
3. All Other Than Dwelling or Farm Property (Commercial Mono-Line or Commercial Multi-Line)	$ 0

*NOTE 1: "Direct Premium Written" means gross direct premiums (excluding reinsurance assumed and ceded to the Mississippi Windstorm Underwriting Association) written on property in this state for Extended Coverage Causes of Loss, including the Extended Coverage components of Comprehensive Dwelling and Other Dwelling Package Policies and Commercial Multi-Peril Package Policies; and also including Basic Group II, Causes of Loss Gross Direct Written Premiums from Commercial Mono-Line and Commercial Multi-Line Policies; and the total policy premiums for Homeowners, Farmowners and Indivisible Premium Comm'l Multi-Peril Policies; less direct prem written on property policies in the counties of George, Hancock, Harrison, Jackson, Pearl River and Stone which do not provide insurance against the perils of windstorm and hail; and less returned prem on cancelled contracts, dividends paid or credited to policyholders or the unused or unabsorbed portion of premium deposits.

**NOTE 2: " Dwelling " refers to extended coverage premiums which are derived from insuring all Dwelling properties, including premiums which come from Comprehensive Dwelling Policies.

PART IV: If this report is on a Group basis, list below the names of all individual Member Companies whose premiums are included.

United States Fire Insurance Company
The North River Insurance Company - No Data for 2004

All assessments and participation in the Mississippi Windstorm Underwriting Association are to be in the name of _____ ***United States Fire Insurance Company*** (NAME OF COMPANY) for the entire group.

PART V: We certify that the premiums reported herein are correct to the best of our knowledge.

EXHIBIT
A

Signed Jennie Calcado (NAME AND TITLE) Statistical Analyst

Date 02/14/05

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R. Vol. 50 at 214.

The reporting form calls for various information. However, although the statute requires MWUA to give credit to insurers who voluntarily write property insurance, including wind coverage, in the six coastal counties, there is no blank for reporting the voluntary premiums. MWUA knew that its form was incomplete. R. Vol. 43 at 3625, R.E. 95.

MWUA takes the position that in order to receive the mandatory credit for voluntary premiums, an insurer was charged with knowledge of the undated, unpublished letter even though it was never made part of the statute or Plan of Operation, and was not available on MWUA's website. This letter purports to require each insurer to annually produce a document other than the Insurer's Report in order to receive the statutory credit. However, the Insurer's Report itself does not suggest in any way that an insurer must do more to receive the mandated credit for voluntary premiums. The form does not refer to any other form or reporting requirements. It does not refer to the unpublished letter. Rather it appears complete on its face.

Without the unpublished, undated letter, there is nothing to alert an insurer that MWUA secretly required an entirely different reporting method to receive the statutorily required exclusion or credit.

Even though the Insurer's Report does not contain a place to record the credit, this omission might have been mitigated if MWUA had annually sent the letter with the alleged reporting procedures. However, MWUA did not send the letter with the Insurer's Report and did not send it out at any other time. Moreover, MWUA did not annually send a form for reporting voluntary premiums.

4. The Hurricane Katrina Assessments.

On August 31, 2005, MWUA levied its first Hurricane Katrina loss assessment and assessed United States Fire $31,420.00. R. Vol 50 at 198.

On December 2, 2005, MWUA levied its second Hurricane Katrina loss assessment and assessed United States Fire $895,470. United States Fire paid this assessment on December 30, 2005. R. Vol. 37 at 1123, R. Vol. 50 at 211-218.

On April 17, 2006, MWUA levied its third Hurricane Katrina loss assessment. The Recalculated Statement of Participation for the Period January 1, 2005 – December 31, 2005 representing a **preliminary** accounting of United States Fire's participation for that period indicated that United States Fire's proportionate share of the total assessments levied by MWUA for Hurricane Katrina losses was $2,511,098 and that the assessment due was $1,584,208. R. Vol. 37 at 1124-26. R. Vol. 50 at 227.

5. MWUA Discovers Many Insurers Have Not Properly Reported Voluntary Premiums.

At the January 11, 2006 MWUA board meeting, MWUA's counsel pointed out that several companies, including Audubon Insurance Group (AIG), its administering insurer, had failed to properly report voluntary premiums. Tellingly, according to the January 11, 2006 board meeting minutes, the attorney for MWUA suggested that the reporting form be changed because it did not request all of the information necessary for the calculations:

> "It was noted that the forms for reporting of premiums should be revised to reflect all the details needed for calculating assessments."

R. Vol. 43 at 3625, R.E. 80. Accordingly, at the January 11, 2006 meeting, MWUA knew its reporting form did not request all of the information required for MWUA to properly calculate an assessment giving credit for voluntary premiums as the Mississippi enabling statutes require.

Finally, at that point, knowing the Insurer's Report form was incomplete and that several companies had not reported voluntary premiums as outlined in the unpublished letter, MWUA decided to allow all insures to re-report until March 1, 2006. This purported deadline was preliminarily disclosed in a letter dated January 17, 2006. This letter failed to reveal that MWUA knew the participation percentages were going to change because AIG had not gotten credit for $33 million in voluntary premiums. In fact, the letter implied that no changes might be made. R. Vol. 50 at 217-218.

On February 1, 2006 MWUA mailed a second letter, which stated that the Insurance Commissioner had checked everyone's numbers, leading insurers to believe the reporting had been done correctly. This letter failed to note that simply checking the numbers reported on the Insurer's Report would not reveal any alleged problems in reporting voluntary premiums since the form did not have a place to report these premiums. This letter again implied that no changes in the percentages would occur even though MWUA knew almost 10% of the overall assessment would be reallocated. R. Vol. 50 at 219-226. United States Fire did not receive this letter. R. Vol. 50 at 313, 360.

Finally, even though MWUA was allowing a "true-up" by allowing insurers to report voluntary premium because several companies had not reported any voluntary premium, MWUA failed to mail the unpublished letter with the notice or to modify the form to provide a place to record "voluntary premiums."

United States Fire testified that it had no record of receiving the February 1, 2006 letter advising companies of a March 1 deadline. R. Vol. 51 at 313, 360. Although the imposition of a deadline had significant financial effects on some of the member insurers, MWUA did nothing to ensure the members received notice of this deadline other than mail the letter. The mailing was

not certified or any proof of receipt requested. R. Vol. 22 at 3062, Tr. p. 1 The letter was not posted on the MWUA website.[11]

On April 17, 2006, MWUA levied its third Hurricane Katrina loss assessment. The Recalculated Statement of Participation for the Period January 1, 2005 – December 31, 2005 representing a preliminary accounting of United States Fire's participation for that period indicated that United States Fire's proportionate share of the total assessments levied by MWUA for Hurricane Katrina losses was $2,511,098 and that the assessment due was $1,584,208. R. Vol. 50 at 227-229.

On May 26, 2006, United States Fire appealed to MWUA for a refund of assessments overpaid by United States Fire. R. Vol. 50 at 230, R.E. 72.

On July 27, 2006, MWUA denied United States Fire's request for a refund. R. Vol. 50 at 277.

On August 18, 2006, United States Fire timely filed its Notice of Appeal with the Mississippi Commissioner of Insurance. R. Vol. 51 at 281, R.E. 73.

On November 16, 2006, the Commissioner held a hearing on United States Fire's appeal and issued his Findings and Conclusions and Order on May 23, 2008. R. Vol. 51 at 364, R.E. 74.

On June 20, 2008, United States Fire filed its appeal to the Chancery Court of Hinds County, Mississippi. R. Vol. 19 at 2730. On December 15, 2009, the Chancery Court reversed the Commissioner's Order and allowed United States Fire and the other Appellees to file corrected premiums. R. Vol. 29 at 4159, R.E. 23.

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[11] Strangely, the Board sent a letter in January 2006 saying that it would be sending a letter later to explain how to submit information on reporting voluntary premiums with all the necessary information, forms and deadlines. Why MWUA chose to do this rather than simply sending one letter in January is inexplicable.

SUMMARY OF ARGUMENT

Mississippi statutes require MWUA to give credit to insurers who voluntarily write property insurance in the six coastal counties. The voluntary premium is deducted in the determination of participation in the writings of MWUA and calculation of MWUA assessments. Mississippi statutes do not outline a procedure for reporting voluntary premiums to MWUA. Mississippi statutes required MWUA to submit to the Commissioner for approval a Plan of Operation providing for the administration of MWUA. MWUA promulgated a Plan of Operation which was approved by the Commissioner but did not promulgate a deadline or procedure for reporting voluntary premiums.

United States Fire was assessed based on its total premiums written in Mississippi without credit for voluntary premiums despite the statutory mandate that such premiums be deducted. This resulted in an overassessment of United States Fire in the amount of approximately $2,511,098.

MWUA wrongfully denied United States Fire the credit for voluntary premiums. First, MWUA relied upon a procedure for reporting voluntary premiums which MWUA failed to promulgate as a rule, in essence creating a "secret" rule. Second, MWUA attempted to create a March 1, 2006 deadline for filing a report using the secret procedures. But, this new deadline was not adopted as an amendment to the Plan of Operation, was not promulgated as a rule and was not approved by the Commissioner of Insurance. MWUA had no legal authority to set this deadline without amending its Plan of Operation or otherwise promulgating a rule. Accordingly, the purported deadline has no legal effect.

MWUA's basic position is that it had a right to create a March 1, 2006 deadline and enforce it to the detriment of its member companies, depriving them of statutorily mandated credits for voluntary premiums. Although MWUA has certain rule-making abilities and

theoretically could have created deadlines where none existed for reporting voluntary premiums, MWUA failed to follow the statutory procedure necessary to promulgate such a deadline and also failed to obtain the approval by the Mississippi Commissioner of Insurance as required by statute. The deadline MWUA attempted to create and enforce is invalid as a matter of law and cannot be enforced.

After a delay by MWUA, United States Fire's appeal of the Hurricane Katrina assessments was heard by the Chancery Court for the First Judicial District of Hinds County. The Chancellor ruled that MWUA exceeded its authority by refusing United States Fire credit for its voluntary premiums and held that if MWUA seeks to establish a deadline for claiming credit for voluntary premiums then it must promulgate a rule in its Plan of Operation or otherwise by published rule with approval from the Commissioner of Insurance as provided for in the enabling statutes.

MWUA either does not understand United States Fire's argument or the Chancery Court ruling or deliberately mischaracterizes it - - United States Fire is not saying that MWUA cannot establish deadlines and create procedures for reporting voluntary premiums. United States Fire's argument is that, as a matter of law and statute, MWUA **did not promulgate** an enforceable deadline or method for reporting voluntary premiums. MWUA was required to put the deadlines and procedures in the Plan of Operation where such were subject to the review and approval of the Commissioner or to promulgate rules for deadlines and procedures subject to the approval of the Commissioner of Insurance. This ensures that the insurers who are by law required to participate in MWUA could find and follow the applicable rules. By definition, something that is not publicly available has not been promulgated. It is undisputed that MWUA failed to amend its Plan of Operation or otherwise promulgate rules concerning any deadline or method for reporting voluntary premiums.

MWUA's brief, however, leaves the impression that the method for reporting voluntary premiums is readily available. Nothing could be further from the truth. The only place the method is disclosed is in an undated letter presumably sent to a company when it first became a member of MWUA. This letter was not publicly available. It was not on MWUA's website. It was never sent to a company again. The contents of the letter were never promulgated as a rule of the MWUA or an amendment to its Plan of Operation, and thus, the deadlines and accounting methods contained in the letter are simply not available to members of MWUA except in this undated letter. The letter is not sent out every year and does not accompany the incomplete form for reporting premiums. Yet, MWUA takes the position that it may enforce the contents of this letter as if the letter constituted a rule.

The statute's use of the term "shall" makes the voluntary premium credit mandatory. Without a promulgated rule or amendment to the Plan of Operation creating procedures and a deadline for reporting voluntary premiums, United States Fire is entitled to credit for its voluntary premiums. Since it is undisputed that MWUA never adopted either a rule or amendment to outline any procedure or deadline for reporting voluntary premiums, MWUA had no legal basis to refuse to accept United States Fire's voluntary premiums or to deny its appeal.

The Chancery Court properly found that MWUA had not established deadlines for reporting voluntary premiums and therefore its denial of United States Fire's appeal was arbitrary and capricious. The Chancery Court Order allowing United States Fire to submit its voluntary premiums should be affirmed.

STANDARD OF REVIEW

Here, the question for this Court is a question of law – can MWUA enforce a deadline and procedure outlined only in an undated, unpublished letter never promulgated a part of MWUA rules or Plan of Operation to deny United States Fire the credit for voluntary premium

mandated by the Mississippi statutes? This is a question of law that the Court must decide. The Court reviews such issues of law *de novo*. *See Tunica County v. Hampton Co. Nat'l Sur., LLC,* 27 So. 2d 1128, 1131 (Miss. 2009); *see also S.C. Ins. Co. v. Keymon,* 974 So. 2d 226, 229 (Miss. 2008).

There is no dispute as to the facts in this case.[12] MWUA stipulated that it did not adopt a deadline or method for reporting voluntary premiums and publish it in the Plan of Operation. Instead, MWUA outlined a procedure for reporting voluntary premiums in a letter that it allegedly sent to a company once, which was not available again to a company and which was not promulgated as a rule in the Plan of Operation or otherwise. This Court has to decide the legal effect, if any, of this undated unpublished letter. The Court must also decide whether Miss. Code Ann § 83-34-9 means that a company's voluntary premiums must be credited in determining its participation in the writings of MWUA and calculating its assessment so as to reduce its assessment. Interpretation of a statute is a question of law subject to *de novo* review. *Camp v. Stokes,* 41 So. 3d 685, 686 (Miss. 2010). This Court makes such decisions of law *de novo.*

A. The Commissioner Improperly Gave Deference to MWUA's Decision, as Though MWUA Were a State Agency.

In this case, the Commissioner of Insurance reviewed the decision of MWUA, which was made without a hearing of any type, as though MWUA were a state agency.

> "However, even though the facts are reviewed *de novo*, the appellate body still gives deference to the overall decision of the underlying agency." R. Vol. 51 at 383.

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[12] MWUA makes the entirely unsupported claim that the Chancery Court made findings of fact based on unsupported statements in briefs. This is entirely incorrect. The facts were largely stipulated below. The only question was the legal effect of the stipulated facts.

MWUA, however, is not entitled to any deference afforded by the Commissioner. *See, e.g., Owens Corning v. Mississippi Ins. Guar. Ass'n*, 947 So. 2d 944, 945-46 (Miss. 2007). As the Mississippi Supreme Court stated in *Owens Corning*:

> It is true that this Court accords great deference to an administrative agency's construction of its own rules and regulations and the statutes under which it operates, and we will not substitute our judgment for the agency's unless the latter's interpretation is arbitrary or unreasonable. *Elec. Data Sys. Corp. v. Miss. Div. of Medicaid,* 853 So. 2d 1192, 1202 (Miss. 2003). However, MIGA is not a state agency, and therefore its interpretation of the Insurance Guaranty Act is not entitled to deference. MIGA is a nonprofit, unincorporated legal entity of which all insurers with the authority to transact insurance in this State are made members. *Miss. Ins. Guar. Ass'n v. Gandy,* 289 So. 2d 677 (Miss.1973); *see also* Miss. Code Ann. § 83-23-111. MIGA is not an entity akin to the Mississippi Division of Medicaid or any other administrative agency.

Id. The Mississippi Insurance Guaranty Association is a nonprofit, unincorporated legal entity comprised of mandatory member insurers. The Mississippi Supreme Court ruled such an entity's decisions are not entitled to deference as a state agency. Likewise, MWUA is a nonprofit unincorporated legal entity. As such, its decisions are not entitled to deference by the reviewing agency. MWUA is not a state agency and, pursuant to *Owens Corning*, its decisions are to be reviewed under the traditional *de novo* standard. *See id.* at 946. *See also Fla. Dep't of Ins. v. Fla. Ass'n of Ins. Agents*, 813 So. 2d 981, 982-83 (Fla. Ct. App. 1st Dist. 2002) (insurance pools are not "agencies" in Florida); *Prop. Ins. Ass'n of La. v. Theriot*, 31 So. 2d 1012 (La. 2010) (insurance pool was private association). By giving deference to MWUA's decision rather than reviewing the decision *de novo*, the Commissioner of Insurance committed reversible error.

B. The Chancery Court's Order Finding the Commissioner's Order Arbitrary and Capricious Should Be Affirmed.

Although the courts give deference to the decisions of an administrative agency, those decisions must be reversed if "(1) unsupported by substantial evidence; (2) arbitrary or

capricious; (3) beyond the power of the administrative agency to make; or (4) in violation of some statutory or constitutional right of the complaining party." *Shelter Mut. Ins. Co. v. Dale*, 914 So. 2d 698 (Miss. 2005) (relying on *Am. Federated Life Ins. Co. v. Dale*, 701 So. 2d 809, 811 (Miss. 1997) and *Miss. Comm'n on Envtl. Quality v. Chickasaw County Bd. of Supervisors*, 621 So. 2d 1211, 1215 (Miss. 1993)). "An administrative agency's decision is arbitrary when it is not done according to reason and judgment but depending on the will" of the agency alone. *Pub. Employees Ret. Sys. v. Shurden*, 822 So. 2d 258, 264 (Miss. 2002) (citation omitted). "An action is capricious if done without reason, in a whimsical manner, implying either a lack of understanding of or disregard for the surrounding facts and settled controlling principles." *Id.* Decisions by a state agency that are simply unreasoned are, by definition, arbitrary and capricious. *See Miss. Sierra Club, Inc. v. Miss. Dept. of Envtl. Quality*, 819 So. 2d 515, 525 (Miss. 2002). Any state agency decisions that violate governing statutes shall be reversed as a matter of law. *See Am. Federated Life Ins. Co.*, 701 So. 2d at 812-13. Arguments of public policy and the best interest of the agency can never override governing statutory law. *Id.*

The Chancery Court found that the Mississippi statute mandated that MWUA give credit for voluntary premiums and that MWUA did not promulgate or establish a deadline or procedure for reporting of voluntary premiums or for denying the credit as the statutes require. R. Vol. 29 at 4159, 4181-86, R.E. 23, 45-50. The Court found the Commissioner's Order enforcing the March 1, 2005 date to be arbitrary and capricious. R. Vol. 29 at 4186, R.E. 50. The Court stated:

> Given the mandatory nature of credits, the establishment of a March 1, 2006 deadline beyond which no appeal, correction or reconciliation of mistakes may be made is more akin to a statute of repose which MWUA had no authority to promulgate, especially without publication or approval from the Commissioner or disclosure of all information regarding previous refunds to other members.

R. Vol. 29 at 4189, R.E. 53.

The facts in this case were largely undisputed. The Chancery Court made no findings of fact, but rather made conclusions of law based on undisputed facts. MWUA's suggestion that the Court made new findings of fact based on unsubstantiated arguments in the briefs is entirely incorrect. MWUA entered into exhaustive stipulations that are equally applicable to each Appellee. The Court correctly applied Mississippi law to these stipulated facts. However, to the extent that the Court finds the Chancellor made any factual findings in this case, this Court has a limited review of the Chancery Court finding:

> "This Court has a limited standard of review in examining the decisions of a chancellor." *McNeill v. Hester*, 753 20. 2d 1057 (Miss. 2000). A chancellor's findings will not be disturbed upon review by this Court unless the chancellor was manifestly wrong, clearly erroneous, or applied the wrong legal standard. *Bank of Mississippi v. Hollingsworth*, 609 So. 2d 422, 424 (Miss. 1992). "The standard of review employed by this Court for review of a chancellor's decision is abuse of discretion." *McNeill,* 753 So. 2d. The standard of review for questions of law is *de novo. Consolidated Pipe & Supply Co. v. Colter*, 735 So. 2d 958, 961 (Miss. 1999)." *Burnett v. Burnett*, 792 So. 2d 1016 (Miss. Ct. App. 2001).

The Chancery Court Order should be affirmed.

LEGAL ARGUMENT

This case boils down to a simple question. Did MWUA properly amend its Plan of Operation or otherwise promulgate a deadline for submitting voluntary premium information or for filing an amended Insurer's Report? Because MWUA did not properly amend its Plan of Operation or promulgate a rule, MWUA had no such enforceable deadline in existence prior to United States Fire providing to MWUA supplemental voluntary premium information on May 26, 2006.

Camp, 41 So. 3d at 686 ("when a statute is plain on its face, there is no room for statutory construction."). *Allred v. Yarborough,* 843 So. 2d 727, 729 (Miss. 2003) (citing *City of Natchez v. Sullivan,* 612 So. 2d 1087, 1089 (Miss. 1992) (statutes are to be applied literally according to plain meaning with no exception where language is plain, unambiguous and conveys clear and definite meaning); *Davis v. Pub. Employees Ret. Sys.,* 750 So. 2d 1225, 1233 (Miss. 1999) (Court will not impute unjust or unwise purpose to legislature when other reasonable construction can save it from such imputation).

United States Fire has been overassessed $2,511,098 by MWUA as a result of United States Fire's not receiving the voluntary premiums credit.

1. The Chancery Court Correctly Held MWUA Has No Authority to Deviate From the Statute.

An administrative agency or statutorily-created entity has only the powers expressly granted to it by statute or necessarily implied in its grant of authority. *Wilkerson v. Miss. Employment Sec. Comm'n,* 630 So. 2d 1000, 1001 (Miss. 1994). If an administrative agency or statutorily created entity exceeds its authority, then its decision is void. *Id.* at 1001-02. Similarly, a statutorily created entity has only the powers expressly granted to it by statute.

Under Mississippi law, MWUA's decision denying United States Fire the exclusion for its voluntary premiums is void. As noted, Section 83-34-9 expressly provides that insurers must be given credits for voluntary premiums. According to its own governing documents, members must receive credit for voluntary premiums, and their assessments must be reduced accordingly. MWUA's Plan of Operation does not provide a mechanism for denying the statutory required credit for voluntary premium either by having a deadline or procedure for reporting voluntary premiums.

Any power exercised by an administrative agency or statutory entity "must be found within the four corners of the statute under which it operates." *Miss. Pub. Svc. Comm'n v.*

promulgated and also are expressly subject to the approval of the Commissioner. Miss. Code Ann. § 83-34-29.

Moreover, neither those documents nor anything in those documents were promulgated by MWUA. BLACK'S LAW DICTIONARY defines promulgate as follows:

> To publish; to announce officially; to make public as important or obligatory. The formal act of announcing a statute or rule of court. An administrative order that is given to cause an agency law or regulation to become known or obligatory.

BLACK'S LAW DICTIONARY at 1334 (9th ed. 2004).

It is undisputed that MWUA did nothing to promulgate these documents. The undated letter upon which MWUA so heavily relies was not available to the public in any shape, form or fashion, and MWUA failed to make it available to United States Fire.

The safeguards afforded to both member companies and policyholders of MWUA ensure that at a minimum any rule promulgated by MWUA must also have been approved by the Mississippi Commissioner of Insurance. Equally important, promulgation of a rule ensures that the rule is publicly available so that those subject to the rule may find it. While MWUA may not be expressly subject to the Mississippi Administrative Procedures Law, MWUA rules should be made pursuant to a rulemaking process that conforms to the model Administrative Procedures Act as may be appropriate to the operations of MWUA.[13] In any event, since Mississippi law requires insurers to be members of MWUA, at a minimum, those members must not be subject to secret "rules." Promulgation of any rules accomplishes this.

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[13] Any regulation promulgated by the Mississippi Commissioner of Insurance is subject to the Mississippi Administrative Procedures Law. Miss. Code Ann. § 25-43-1.01, et seq. The Mississippi Legislature has recognized that rulemaking procedure for statutorily created or authorized entities should follow a process that conforms to the Model State Administrative Procedures Act of 1981, as amended. *See* Miss. Code Ann. § 83-69-1, Art. VII (2009) (required term of Interstate Insurance Product Regulation Compact is that Interstate Insurance Product Regulation Commission make rules pursuant to a rulemaking process that conforms to the Model State Administrative Procedures Act.)

In its brief MWUA cites as authority for denying United States Fire the statutorily mandated credit for voluntary premiums a document entitled "Manual of Rules and Procedures." First, as MWUA stipulated, the Manual of Rules and Procedures also failed to include any deadline or procedure for reporting voluntary premiums. As a result, the Manual of Rules and Procedures provides no authority whatsoever for denying United States Fire the statutorily mandated credit for voluntary premiums. Second, MWUA does not allege in its brief and in the record below does not expressly indicate that the Manual of Rules and Procedures was approved by the Mississippi Commissioner of Insurance as required in connection with any rules **promulgated** by MWUA. Third, MWUA has previously argued to this Court that its Manual of Rules and Procedures is "an internal document that is neither a part of the insurance contract, a statute, nor a document that is required by statute." *Luedke v. Audubon Ins. Co.*, 874 So. 2d 1029, 1032 (Miss. Ct. App. 2004).

B. The March 1, 2006 Deadline for Reporting Exceeded MWUA's Authority.

MWUA's primary basis for denying United States Fire the credit for voluntary premiums is its reliance on March 1, 2006 as the purported deadline by which corrected premium information for 2004 was to be submitted to MWUA. To the extent that MWUA wishes to make rules concerning the statutory requirement of giving credit for voluntary property premiums, it must do so by published rule or amendments to its governing documents, "not by an unwritten practice subject to ad hoc and sporadic application." *Wilkerson*, 630 So. 2d at 1002. Albert Parks testified that the two letters in January and February 2006 did not constitute an amendment to the Plan of Operation. R. Vol. 22 at 3062, Tr. p. 29.

Moreover, rule-making power does not extend to the adoption of regulations that are inconsistent with governing statutes. *See Am. Federated Life Ins. Co. v. Dale*, 701 So. 2d 809, 812 (Miss. 1997); *see also Miss. State Tax Comm'n v. Reynolds*, 351 So. 2d 326, 327 (Miss.

1977). An administrative rule or regulation may not contravene or nullify the controlling statute. *See Id.* at 328. "A regulation...that cannot find statutory authority to support the action is void." *Bd. on Law Enforcement Officer Standards and Training v. Rushing*, 752 So. 2d 1085, 1090 (Miss. Ct. App. 1999) (citation omitted). No statutory or regulatory authority supports the denial of exclusion of farm property premiums.

MWUA has argued that it had the discretion to establish a new March 1, 2006 deadline for its members to report voluntary premiums. These letters were sent by regular mail, not by certified mail, and without any other sort of publication. MWUA did not promulgate an amendment to the Plan of Operation or otherwise promulgate a rule. MWUA takes the position that any insurer who failed to file a report by March 1, 2006 forever waived any errors in calculations and any right to appeal. Even assuming that the letter did establish a March 1, 2006 deadline for reporting of voluntary premiums, MWUA did not have the authority to establish a new deadline without properly following the statutory guidelines which require promulgation of a rule or an amendment to the Plan of Operation. And, because MWUA did not publish the letter on its website or promulgate it as a rule, there were no safeguards for making sure all insurers received the letter with the "new deadline." In fact, United States Fire has no record of receiving the letter.

As of May 26, 2006, when United States Fire submitted its voluntary premiums, neither Miss. Code Ann. § 83-34-1, *et seq.*, nor the Plan of Operation provided any such deadline for the receipt of voluntary premium reports. In addition, nothing in the statutes or the Plan of Operation, or in the Manual of Rules and Procedures provides any rules whatsoever on the subject of multiple special assessments, miscalculations, revisions or refunds such as the one that MWUA allowed AIG for its clearly inadvertent mistake. Anyone in the public or any insured member would seek in vain for any guidance under the Plan of Operation for a deadline or

procedure for reporting farm property premiums or voluntary premium or for correcting an inadvertent mistake or seeking a refund.

If MWUA seeks to establish new rules governing operations, it was required to do so by published rule approved by the Commissioner. R. Vol. 2 at 103. Miss. Code Ann. § 83-34-29 provides that "[t]he association is **authorized to promulgate rules for the implementation** of this chapter, **subject to the approval of the commissioner.**" (emphasis added). The Commissioner expressly recognized that formulation of any new rules must follow this procedure, yet he failed to address the complete absence of any such rules in the Plan of Operation. In fact, the Commissioner cited general rules that mirrored the enabling legislation, but conspicuously absent from this discussion was any time line for reporting and appeals of assessments. As recognized by the Chancery Court on appeal, there were no such published rules in the Plan of Operation approved by the Commissioner specifically covering the time lines for reporting and appeals of any inadvertent errors, as evidenced by the multiple assessments in a single year and huge refunds granted to other members for their inadvertent errors.

Perhaps fatal to MWUA's claims that it could create a new deadline and enforce it against companies who did not follow the secret procedure for reporting farm property premiums or voluntary premiums is that the MWUA board minutes of the January 11, 2006 meeting reflect that MWUA knew there was no deadline for reporting premiums: Greg Copeland, the board attorney, advised that the statutes only address how the assessment is to be calculated without any deadline for reporting appropriate premiums. R. Vol. 43 at 3625, R.E. 95. Even knowing this, MWUA wholly failed to amend its Plan of Operation. Moreover, MWUA also **knew** (after it received numerous appeals) that there was no appeal deadline. The June 2006 minutes state:

> Greg Copeland [attorney for MWUA] suggested establishing a specified time period for companies to appeal or contest their participation percentages in the future.

R. Vol. 43 at 3631.

Finally, MWUA knew that for such a newly adopted deadline to become effective, MWUA would have to amend its Plan of Operation:

> This appeal process should also be incorporated into the MWUA Plan of Operation as future changes are submitted.

R. Vol. 43 at 3631.

Notwithstanding the knowledge that there was no deadline for appeal of the participation percentage (or for reporting of voluntary premium or farm property premium), MWUA failed to promulgate a deadline and denied all of the appeals.

As conceded by MWUA at the hearing, corrections and refunds for inadvertent errors had been routinely allowed in the past before Hurricane Katrina. R. Vol. 30 at 33. There were simply no rules promulgated on the subject, approved by the Commissioner, published for comment or finally included in the Plan of Operation. MWUA's director, Albert Parks, confirmed that the letter to its members did not constitute an amendment to the Plan of Operation. By definition, an inadvertent error could not have been discovered by the alleged deadline of March 1, 2006 anyway since it was prior to the calculation and notice of the third assessment. In the absence of any published and approved rules regarding refunds for inadvertent errors and miscalculations by anyone including MWUA, the Chancery Court properly found that denial of United States Fire's appeal and refund was arbitrary and capricious.

The Chancery Court properly held that MWUA exceeded its authority in attempting to establish a March 1, 2006 deadline.

C. United States Fire Timely Appealed.

United States Fire timely appealed the assessment filing its appeal on May 26, 2006. As the Chancery Court found, MWUA has never contended that United States Fire did not timely

appeal. In fact, to the extent MWUA now hints that the appeal was untimely, MWUA has waived any such claim by failing to raise it below.

D. The Chancery Court Properly Held That the Assessments Were Analogous to Taxes, Which Can Be Refunded if Overpaid.

MWUA takes the interesting, but inconsistent, position that once an insurer submits its premium report, if it turns out that the insurer over-reported its premium, then the insurer has no remedy and must forever be barred from submitting corrected information. If, on the other hand, MWUA decides that the insurer has under-reported its premium, then MWUA may force the insurer to resubmit premiums. There is no basis for its second response if the deadline is absolute. Either it applies, or it does not apply.

In all other analogous situations a party may submit corrected information. For instance, if a taxpayer makes an error in reporting his taxes to the extent that he has overpaid taxes, he is permitted a three-year period within which to file an amended return and obtain a refund. This is true for ad valorem taxes, and income taxes. The Chancery Court concluded that the assessments were much like privilege taxes since each of the insurers were required to become members of MWUA as a precondition for doing business in Mississippi. Miss. Code Ann. § 27-73-1 provides that someone who overpays a privilege tax under Mississippi law may obtain a refund:

> if any person, firm or corporation has paid, or shall hereafter pay, to the auditor of public accounts, state tax commission of the commissioner of insurance, through error or otherwise, whether paid under protest or not, any ad valorem, privilege or excise tax for which such person, firm or corporation was not liable, or any such taxpayer has paid any tax in excess of the sum properly due and such erroneous payment or overpayment has been paid into the proper treasury the taxpayer shall be entitled to a refund of the taxes so erroneously paid.

Whether or not the assessment constitutes a privilege tax is not the issue here. The issue is whether MWUA can keep an overpayment of assessment while simultaneously claiming that it

may "go after" any insurer it deems has underreported premiums. A taxpayer who has inadvertently made a clerical error which results in an overpayment is entitled to a refund. *See* Miss. Code Ann. § 27-73-1; *see also Barnett v. United States Cas. Co.*, 21 So. 2d 5 (Miss. 1945). So, too, is United States Fire.

E. The Law, Equity And Precedent Require MWUA to Accept United States Fire's Report of Voluntary Premiums and Recalculate Its Assessment.

Section 83-34-13 requires MWUA to devise a Plan of Operation that "shall provide for the efficient, economical, fair and nondiscriminatory administration of the association." A simple principle is at stake here: If a member of MWUA overpays its assessment, then the overpayment must be refunded to the member. This is the law. It is also, fair, equitable and nondiscriminatory. "Whatever the reason, the payment of more than is rightfully due is what characterizes an overpayment," and overpayments must be refunded. *Jones v. Liberty Glass Co.*, 332 U.S. 524, 532, 68 S.Ct. 229, 233 (1947). Even when a taxpayer overpays his taxes, "the taxpayer shall be entitled to a refund of the taxes so erroneously paid." Miss. Code Ann. § 27-73-1.

In this case, United States Fire has been overassessed because it was not afforded credit for its voluntary premiums. The so-called "rules" for the reporting of voluntary premiums were unpublished and unavailable. The rules and deadline for reporting are required to be in the Plan of Operation or otherwise promulgated rule to avoid this very scenario. Both the law and elementary justice require affirming the Chancery Court Order.

Throughout its brief, MWUA argues that the Appellee companies, including United States Fire, are trying unfairly to pay less than they were assessed. However, MWUA does not dispute that United States Fire is statutorily entitled to a credit for voluntary premiums in calculating its assessment. The Mississippi Legislature clearly thought that such credit is fair when it mandated the credit. The Mississippi Legislature designed a mechanism to reward

insurers who wrote policies in the coastal areas to encourage insurers to write coastal business. In fact, the insurers who wrote policies in the coastal counties had exposure for direct losses suffered by their own insured. Each claim paid by an insurer is a claim that MWUA would have had to pay but for the insurer who assumed that policy. Hence, it is only fair that these companies receive credit for the premiums on those policies.

Instead of recognizing that United States Fire and the other insurers are legitimately entitled to exclude certain premiums from consideration in the assessment, MWUA acts as though the Appellees are surreptitiously trying to avoid a payment - - to the contrary, the other member insurers of MWUA have received a benefit to which they are not statutorily entitled. The other insurers have actually received a windfall based on MWUA's failure to provide reporting forms with blanks for voluntary premiums and from MWUA's failure to have any reporting and deadline requirements in its Plan of Operation or promulgated rules.

Moreover, it is not unfair to other members of MWUA to require MWUA to accept the corrected reports of insurers like United States Fire, who were entitled by statute to receive credit for voluntary premiums. The other members will simply be allocated the percentage of MWUA's expenses that they actually owe. If MWUA is permitted to deny the voluntary credits, the other insurers will pay less than they owe under the statutes and the Appellee insurers will pay more than they owe. The other insurers will, in effect, receive a windfall that they are not entitled to under the Mississippi statutes while the Appellee insurers will pay more than the statutory scheme dictates.

F. Statute of Limitations Provides Finality.

MWUA argues that if it allows the corrected report, there will never be finality. MWUA's counsel Greg Copeland stated in his July 27, 2006 letter denying United States Fire's

appeal that "to accept corrections now would make the resolution and letters meaningless and would leave the 2004 data open forever." R. Vol. 50 at 279. This is simply not the case.

The MWUA governing statutes provide member insurers who may be aggrieved by an act, ruling or decision of MWUA the opportunity to appeal to the Commissioner. *See* Miss. Code Ann. § 83-34-19. At most, Mississippi's general three-year statute of limitations likely would apply to any such appeals. *See* Miss. Code Ann. § 15-1-49 (1999). While this may not provide the swiftness of finality desired by MWUA, it may provide finality in any event.

G. There is Finality in This Case Because of the Res Judicata Effect of These Appeals.

In the Union National appeal, the Court was set to hear argument on the appeal, and MWUA filed a Motion for Joinder of all of its members. As a result of that motion, the Court entered into an Agreed Order which provided that:

> This Court finds that it is equitable, reasonable, and appropriate to consolidate all appeals and also allow any interested member company to join in this action. Consolidation and joinder will allow those interested member companies that elect to do so to present their own positions. Consolidation and joinder will avoid the possibility of repeated re-assessments, potential appeals and the potential for inconsistent results.
>
> IT IS THEREFORE ORDERED:
>
> A. The time provided by § 83-34-19 of the Mississippi Code and the Plan of Operations to appeal MWUA's actions in determining the percentages of participation for Hurricane Katrina has expired. No member company that has not previously filed a timely appeal can now appeal the determination of percentages of participation by the MWUA or raise new issues in this action.
>
> *Joinder of All Member Companies*
>
> B. MWUA is directed to serve summons within thirty (30) days of the entry of this Order in the form attached to this Order as Exhibit A on each member company not presently a party in this action. MWUA must attach to such summons a copy of this Order.
>
> C. Any member company that desires to participate in this action must enter an appearance as an "Interested Party"

> within forty-five (45) days of service of the summons by filing a written appearance with the clerk in the form attached to the summons, which is Exhibit A to this Order, with copies to the counsel for the original parties.

R. Vol. 19 at 2636-2637.

Then, the Summons sent to all member insurers stated:

> By this SUMMONS, you are required within forty-five (45) days of receipt of this Summons to notify the Court and the original parties whether or not your company wishes to participate in these appeals. Notification shall be made in the form attached to these summons (Entry of Appearance as an Interested Party). WHETHER OR NOT YOU RESOND, **YOU WILL BE BOUND** BY THE RESULTS OF ANY ORDERS OF THE TRIAL AND/OR APPELLATE COURTS CONCERNING THE MWUA ASSESSMENTS FOR HURRICANE KATRINA. **YOU WILL BE REQUIRED TO PAY OR RECEIVE ANY REASSESSMENT OR REFUND ORDERED BY THE COURT WITHOUT ANY RIGHT OF FURTHER RECOURSE.**

R. Vol. 19 at 2643.

At the hearing to obtain this subpoena, held on April 29, 2008, MWUA argued that they wanted all of its member insurer companies subpoenaed so that they could later say "this is your shot and I don't want to hear from you later. This is your res judicata right now. Get in or not." R. Supp. Vol. I, Tr. p. 15. MWUA recognized at that point that the subpoena would cure any problems with subsequent appeals from this Court's decision: "Having gotten that [the subpoena] - - that way they won't ever later be able to complain." R. Supp Vol. I, Tr. p. 36. All of MWUA member companies were subpoenaed. *See* R. Vol. 1 at 3-15 for a listing of all summonses and returns. Each one had an opportunity to appear and be heard. The only member company other than the eight Appellee insurers who made any argument before the Chancery Court was Hartford Insurance & Indemnity Company. Only Hartford arguably has the right to act in any sort of appellant capacity. All of the other insurance companies are bound by the

ruling of the Chancery Court, and subsequently by the ruling of this Court, under the general rules of res judicata.

Moreover, this Court should not hear any arguments from any member insurer in amicus briefs. Each had the opportunity to state its positions at the Chancery Court level, and having waived that right, none of the companies other than MWUA and arguably Hartford may attempt to overrule the Chancery Court because they took no position whatever in the Chancery Court proceeding. It is axiomatic that a party cannot put a Chancery Court or any other court in error based on any argument they failed to make below. Here, having not appeared, the parties simply have waived their right to complain about the Chancery Court Order.

CONCLUSION

The Chancery Court correctly ruled that United States Fire is entitled to submit its voluntary premiums and that MWUA must recalculate the participation percentages for the Hurricane Katrina assessments after the Appellees have resubmitted the premium information. United States Fire is entitled to a refund of all amounts paid and a ruling that it has no further assessments for Hurricane Katrina-related claims. The decision of the Chancery Court must be affirmed.

Respectfully submitted, this the 29th day of November, 2010.

UNITED STATES FIRE INSURANCE COMPANY

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CERTIFICATE OF SERVICE

I hereby certify that a copy of this document has been mailed to the following individuals:

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